

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Red Eagle Exploration Limited

v.

Republic of Colombia

(ICSID Case No. ARB/18/12)

DECISION ON BIFURCATION

Members of the Tribunal

Dr. Andrés Rigo Sureda, President of the Tribunal

Mr. José A. Martínez de Hoz, Arbitrator

Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

3 August 2020

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. THE PARTIES’ ARGUMENTS.....2

 A. The Respondent’s Position.....2

 B. The Claimant’s Position5

III. THE TRIBUNAL’S ANALYSIS.....8

 A. Preliminary observations.....8

 B. The applicable norms and standards8

 C. The Respondent’s Objections..... 11

 a) Red Eagle’s alleged failure to comply with FTA’s conditions precedent..... 11

 (i) Failure to state legal and factual basis for its claims 11

 (ii) Failure to comply with mandatory time limits..... 12

 b) The claims are outside the jurisdiction *ratione temporis* of the Tribunal..... 13

 c) Colombia denied benefits of the FTA to the Claimant..... 14

 D. Bifurcation of the merits into liability and quantum..... 16

IV. COSTS.....16

V. DECISION.....16

I. INTRODUCTION

1. On March 21, 2018, Red Eagle Exploration Limited (“**Red Eagle**” or the “**Claimant**”), filed a Request for Arbitration (“**RfA**”) against the Republic of Colombia (“**Colombia**” or the “**Respondent**”) pursuant to the Canada-Colombia Free Trade Agreement (“**FTA**” or “**Treaty**”). The Tribunal was constituted on April 19, 2019. Procedural Order No. 1 was issued on December 12, 2019 (the “**PO1**”). A decision on the Respondent’s preliminary objections pursuant to ICSID Arbitration Rule 41(5) was issued on December 16, 2019.
2. On January 28, 2020, the proceeding was stayed for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d). It was resumed on February 6, 2020, following payment of the required advances.
3. Following the parties’ agreement on an extension for the filing of their submissions, an amended Annex B to Procedural Order No. 1 was transmitted to the parties on April 6, 2020.
4. In accordance with the amended procedural calendar, the Claimant submitted its Memorial on the Merits on May 16, 2020, together with Appendices A to C, Indices of Exhibits and Legal Authorities, Witness Statement of Ana Milena Vásquez with Appendices A and B, Expert Report of Kiran Sequeira with Appendices A to C.5 and Exhibits VP-01 to VP-52, Legal Opinion of Adriana Martínez Villegas with Appendices A and B, Exhibits C-0001 to C-0814 and Legal Authorities CL-001 to CL-0152 (the “**Memorial**”).
5. On June 2, 2020, an amended Procedural Order No. 1 was transmitted to the parties reflecting a change in the transmittal of the parties’ hardcopies of their submissions.
6. On June 16, 2020, the Respondent filed a Request for Bifurcation together with Indices of Exhibits and Legal Authorities; Exhibits R-009 to R-014; and Legal Authorities RL-0011 to RL-0039 (the “**Bifurcation Request**”).
7. On July 16, 2020, the Claimant submitted its Observations on the Respondent’s Request for Bifurcation, together with an Index of Legal Authorities and Legal Authorities CL-0153 to CL- 0187 (the “**Claimant’s Observations on Bifurcation**”).

II. THE PARTIES' ARGUMENTS

A. The Respondent's Position

8. The Respondent first explains that the Bifurcation Request is “not intended to be a comprehensive account of Colombia’s jurisdictional and admissibility objections and, as such, it does not for example include its objection to jurisdiction in connection with the termination of these proceedings in accordance with Rule 45 of the ICSID Arbitration Rules, which will be resubmitted at the appropriate jurisdictional phase of this arbitration. The Respondent reserves all rights, including the right to submit any further jurisdictional or admissibility objections that it deems appropriate.”¹
9. Based on Article 41(2) of the ICSID Convention, Rule 41(1), (3) and (4) of the Arbitration Rules and Article 829 of the FTA, and extensive jurisprudence, the Respondent asserts that there can be no question that the Tribunal has the power to bifurcate the proceedings to rule on jurisdictional or admissibility objections as a preliminary question separate from the merits.
10. The Respondent refers with approval to the test distilled from the practice of tribunals in deciding whether a proceeding should be bifurcated, namely, “whether the jurisdictional objections at issue (i) were *prima facie* serious and substantial, (ii) could be examined without prejudging or entering into the merits, and (iii) if successful, disposed of all or an essential part of the claims.”² Furthermore, the Respondent argues that if the Tribunal finds that “one jurisdictional objection warrants bifurcation, it can consider it appropriate to decide all the remaining jurisdictional objections in the bifurcated jurisdictional stage as well.”³
11. The Respondent raises three jurisdictional objections. First, the Respondent affirms that the Claimant had failed to comply with the FTA’s conditions precedent to access arbitration. The Respondent explains that, according to Article 821 of the FTA, failure to meet any conditions precedent nullifies the Respondent’s consent to arbitration. The Respondent argues that the dispute submitted to arbitration concerns a different array of measures from those described in the Notice of Intent. Therefore, it does not meet the requirement of Article

¹ Bifurcation Request, para. 2.

² *Id.*, para. 14.

³ *Id.*, para. 17.

- 821(2)(c) to specify the legal and the factual basis for the claim, including the measures at issue.
12. The Respondent further argues that the Claimant has failed to comply with the FTA's mandatory time limitations. Article 821(2)(e)(i) of the FTA requires that no more than 39 months should have elapsed since the investor acquired or should have acquired knowledge of the alleged breach and of the loss or damage incurred. According to the Respondent, the critical cut-off date is December 21, 2014 (“**Cut-Off Date**“), more than 39 months before March 21, 2018, the date on which ICSID's Secretary-General received the Claimant's RfA. The Respondent describes the measures it enacted relevant to the Claimant's mining activities in the *páramos* well before that date. In particular, it refers to Law 1382 passed in February 2010 which introduced a general ban on mining in *páramo* ecosystems, including the *Santurbán páramo* (“**SP**”). The Respondent contends that, although Article 3 of Law 1382 grandfathered projects at the exploitation stage with a valid mining title and environmental license issued prior to February 9, 2010, the Claimant did not benefit of the transitional regime because it did not obtain an environmental license prior to that date.
 13. The Respondent argues that this objection (i) is serious since lack of compliance with preconditions to arbitration nullifies consent, (ii) concerns a discrete set of facts which can be examined without prejudging the merits, and (iii) may dispose of the entire case.
 14. The second objection raised by the Respondent is a *ratione temporis* objection on the basis of Article 801(2) of the FTA. This article provides that “the provisions of this Chapter [Eight] do not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.” The Respondent notes that the FTA entered into force on August 15, 2011 and claims that the ban on mining activities in *páramo* ecosystems was put in place before that date by legislation dated February 2010, May 2011 and June 2011. The Respondent affirms that “the measures challenged by the Claimant are only the ‘continuing ongoing effects’ of the ban on mining in *páramo* ecosystems”⁴ enacted before August 15, 2011.
 15. According to the Respondent, this objection meets the requirements of (i) seriousness, (ii) it can be examined without pre-judging the merits since it only requires the Tribunal to assess

⁴ *Id.*, para. 54.

whether the dispute existed prior to the date of entry into force of the FTA, and (iii) it is capable of disposing of the entire claim.

16. The third objection of the Respondent concerns the denial of benefits to the Claimant. The Respondent observes that, according to Article 814(2) of the FTA, a Party may deny benefits to an investor or its investment if the investor or its investment is owned or controlled by nationals of a non-Party and the investor has no substantial business activities in the territory of the Party under the law of which it is constituted. The Respondent explains that, on April 19, 2018, it denied the benefits of Chapter Eight of the FTA to Red Eagle because it is owned or controlled by investors of a non-Party to the FTA and Red Eagle does not have substantial business activities in Canada.
17. The Respondent argues that “the requirements of control and ownership must be assessed by reference to ultimate ownership and control of Red Eagle, and not its nominal ownership.”⁵ According to the Respondent, Red Eagle operates exclusively in Colombia and does not have substantial business activities in Canada.
18. The Respondent affirms that the objection is serious because there is credible evidence that the Claimant is owned and controlled by non-Canadian nationals and has no substantial business activities in Canada. This is a discrete factual scenario completely independent from the merits of the dispute that can be examined without prejudging them. It is also capable of disposing of the entire case since the benefits denied include the possibility of submitting the dispute to arbitration.
19. In addition, the Respondent argues that the merits should also be bifurcated into liability and quantum phases. According to the Respondent, “[d]ue to the complex fact pattern ingrained in Red Eagle’s damages claims and the copious amount of information required to assess them, it is impossible at this juncture to accurately calculate the amount of Red Eagle’s damages.”⁶ The Respondent asserts that “it would be in the interests of efficiency and judicial economy to await for the Tribunal’s decision on liability before proceeding to the quantum stage.”⁷

⁵ *Id.*, para. 63.

⁶ *Id.*, para. 73.

⁷ *Id.*, para. 73.

20. As relief, the Respondent requests that “the Arbitral Tribunal bifurcate these proceedings and hear the Republic of Colombia’s jurisdictional objections in a preliminary phase, and/or bifurcate the merits into liability and quantum phases.”⁸

B. The Claimant’s Position

21. The Claimant disputes that there be a presumption of bifurcation and that preliminary objections must be decided as a preliminary question in a bifurcated proceeding. In fact the trend in the ICSID Arbitration Rules and other rules indicates an evolution away from bifurcation.

22. The Claimant agrees in that whether bifurcation is granted depends on a three part test consisting of the following factors: (i) the seriousness and substance of the objections, (ii) whether the objections may be decided without prejudging the merits, and (iii) whether the objections, if decided in the Respondent’s favor, would dispose of all or an essential part of the claims raised.

23. The Claimant asserts that the first factor requires a higher threshold than being non-frivolous. The second factor requires that the facts underlying the objection are “distinct from those involved in determining the merits of the claim” and the legal questions raised by it are “likely to be separate and distinct from those arising on the merits.”⁹ The third factor requires that an essential part of the claims or a material portion of them would be disposed of in the jurisdictional phase.

24. The Claimant adds that, in applying these factors, tribunals have been guided by principles of fairness and procedural efficiency, and that the Tribunal should weigh the benefits of applying these principles against the risk of delay, wasted expense and prejudice. In the Claimant’s view, the Respondent “mischaracterizes the threshold required to meet the standard and, tellingly, argues for an interpretation of the various factors that has already been rejected in other cases under the Treaty.”¹⁰

⁸ *Id.*, para. 75.

⁹ Claimant’s Observations on Bifurcation, para.13, citing *Mesa Power v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2, 18 March 2013 (CL-182).

¹⁰ Claimant’s Observations on Bifurcation, para. 15.

25. The Claimant affirms that the Respondent has the burden of proving the need for bifurcation. Each objection needs to be decided *prima facie* on the basis of the Claimant’s pleadings, and “bifurcation of one objection does not necessarily weigh in favor of bifurcating other objections that would not otherwise warrant bifurcation.”¹¹
26. The Claimant then addresses each of the objections. The first objection concerns the Notice of Intent; it has two components, the alleged insufficiency of the Notice and the contention that the claims are barred by the Treaty’s 39-month prescription period. The Claimant argues that the “Respondent has not identified any provision of the Treaty that requires a claimant to include all facts and legal argument on which it will rely in its notice of intent.”¹² In fact, in the Claimant’s view, the Treaty contemplates the notice of intent as a first step progressing to the request for arbitration, memorial, etc. The Claimant contends that consideration of this objection is intertwined with the merits since, “the Tribunal would have to assess each of Respondent’s measures and how the measures referenced in the Notice relate to Respondent’s subsequent acts and omissions.”¹³ Furthermore, this objection is not capable of disposing of the entire case because “there is at minimum, perfected consent for claims arising out of the measures that Respondent admits are detailed in the Notice of Intent.”¹⁴
27. As to compliance with the prescription period, the Claimant argues that to claim, as the Respondent does, that an “objection is *prima facie* serious and substantial merely because Article 821 establishes conditions precedent to consent is a misapplication of the legal standard.”¹⁵ Furthermore, “this objection would require the Tribunal to analyze and rule on the measures that impacted Red Eagle’s investment, when the loss or damage was incurred, and when Claimant has a reasonable degree of certainty of it before the cut-off date, among potential other issues.”¹⁶ According to the Claimant, the Respondent does not explain how this could be a stand-alone assessment. In any case and at a minimum, consent was perfected in respect to claims that are not barred by the prescription period.
28. In addressing the non-retroactivity objection, the Claimant affirms that it does not meet the serious and substantial criteria since Respondent ignores that the “Claimant’s claims are all

¹¹ *Id.*, para. 17.

¹² *Id.*, para. 28.

¹³ *Id.*, para. 31.

¹⁴ *Id.*, para. 32.

¹⁵ *Id.*, para. 37.

¹⁶ *Id.*, para. 38.

premised on events that post-date the Treaty’s entry into force, a fact that Respondent itself admits elsewhere.”¹⁷ The Claimant argues that, “regardless of Respondent’s prior conduct, which the Respondent has mischaracterized, it remains possible that its acts and omissions following the entry into force of the Treaty constitute breaches subject to the Tribunal’s jurisdiction.”¹⁸

29. The Claimant contends that consideration of this objection would require the Tribunal to determine merits issues. According to the Claimant, “Even if the Tribunal were to conclude that a ban on mining activities in the *páramo* arose prior to the Treaty, it would still have to determine, among other things, when that ban became applicable to Claimant’s investment and whether Respondent’s actions constitute independent Treaty violations.”¹⁹
30. The Claimant notes that the arguments of the Respondent seem to focus only on the claim of expropriation under Article 811 of the Treaty, and draws attention to its additional claim that the Respondent failed to grant fair and equitable treatment in violation of Article 805. This claim “encompasses a range of actions by Respondent that go beyond the prevention on mining activities.”²⁰
31. Next the Claimant denies that the third objection is serious or substantive. The Claimant reaffirms that it is the burden of the Respondent to establish the requisite factual basis beyond assertions that there is no credible evidence in the Memorial of the Claimant. The Claimant contends that “[v]ague, unsubstantiated allegations are not enough to warrant bifurcation.”²¹ Furthermore, Respondent communicated its purported denial of benefit after Claimant had submitted its claims to arbitration. The Claimant recalls that under Article 25 of the ICSID Convention consent once given may not be withdrawn.
32. Finally, the Claimant addresses the request for bifurcating the merits into liability and quantum phases. The Claimant observes that this is a novel request not raised by the Respondent in the joint comments on the draft Procedural Order No.1 or in the procedural consultation with the Tribunal. Furthermore, this request is inconsistent with the procedural

¹⁷ *Id.*, para. 43.

¹⁸ *Id.*, para. 45.

¹⁹ *Id.*, para. 46.

²⁰ *Id.*, para. 47.

²¹ *Id.*, para. 52.

scenarios contemplated in that order. In the Claimant's view, the bifurcation of the merits would make the case unnecessarily protracted and inefficient.

33. The Claimant argues that the Respondent gives no basis for its contention that the calculation of damages is impossible or Claimant's calculation insufficient. The Claimant contests the Respondent's assertion that the calculation will be "intricate and costly" since the claim for full reparation in this case consists of the Claimant's sunk costs, plus interest, which can be determined on the basis of the audited financial statements of the Claimant.
34. The Claimant concludes that there is no justification for bifurcating the merits and that the request for splitting the merits phase shows that "Respondent's real concern is to delay a final resolution of this case and to make the proceeding as protracted as possible. This is the opposite of the efficiency that bifurcation is meant to serve."²²
35. The Claimant has requested as relief that the Tribunal rejects the Bifurcation Request and order the Respondent to pay all costs incurred by the Claimant associated with the Bifurcation Request.

III. THE TRIBUNAL'S ANALYSIS

A. Preliminary observations

36. The Tribunal has carefully reviewed and considered all of the arguments presented by the Parties. The fact that this decision may not expressly reference all of them does not mean that such arguments have not been analyzed or taken into consideration. The Tribunal further considers it prudent to note that, at this stage of the proceedings, any decision for or against bifurcation will necessarily be based on a preliminary review of the claims and the objections to its jurisdiction. The Tribunal's decision on bifurcation does not reflect its views on the merits of the objections to jurisdiction or on the merits of the dispute itself.

B. The applicable norms and standards

37. Article 829 of the Treaty provides:

²² *Id.*, para. 59. The Claimant refers to the Bifurcation Request, para. 51.

1. The Tribunal shall have the power to rule on preliminary objections to jurisdiction and admissibility.

2. Any preliminary objection that the dispute should not be submitted or registered, is not within the jurisdiction of the Tribunal, or for other reasons, is not within the competence of the Tribunal, shall be made in accordance with the applicable arbitration rules as early as possible.

38. The ICSID Arbitration Rules are the applicable rules for purposes of Article 829 of the Treaty. ICSID Arbitration Rule 41 on Preliminary Objections provides in relevant part that,

Upon the formal raising an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.²³

39. The Tribunal “may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.”²⁴

40. According to ICSID Arbitration Rule 41, the Tribunal has discretion to bifurcate or not depending on the circumstances of each case. The Tribunal *may* bifurcate a proceeding to decide a preliminary objection. ICSID Arbitration Rule 41 does not establish a presumption in favor or against bifurcation. ICSID Arbitration Rule 41 is silent on the circumstances, criteria or factors that the Tribunal may take into account in the consideration of objections to its jurisdiction.

41. The parties agree in substance that, in order to warrant bifurcation, a jurisdictional objection must be *prima facie* serious and substantial, capable of being examined without prejudging the merits and, if successful, capable of disposing of all or an essential part of the claims. However, they disagree on the level of seriousness and substantive nature of an objection. While for the Respondent it is sufficient that the objection is not frivolous, the Claimant affirms, based on *Eco Oro* that, “a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious.”²⁵ The Claimant refers to other decisions of

²³ ICSID Arbitration Rule 41(3).

²⁴ ICSID Arbitration Rule 41(4).

²⁵ *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, 28 June 2018 (CL- 154) para. 51.

arbitral tribunals that support this contention. Thus the *Gran Colombia* tribunal held that the “‘frivolous on their face’ is a starting point ... [b]ut this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation.”²⁶ Furthermore, an objection may be found to be non-frivolous but not “sufficiently serious and substantial to justify bifurcation.”²⁷

42. The Tribunal observes that in its ordinary meaning “serious” may be considered as the opposite of frivolous. Something frivolous has “no useful or *serious* purpose”²⁸. “Substantial” is defined as something of “considerable importance” or “weighty”²⁹. The Tribunal is of the view that between frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation. It is relevant here to recall that, in deciding whether or not to bifurcate the proceeding the Tribunal has discretion and needs to consider not only procedural efficiency but also fairness; it needs to strike a balance between the two. Both parties agree that the Tribunal needs to conduct an efficient and fair proceeding.³⁰
43. As regards the second factor, a jurisdictional objection is not intertwined with the merits if it concerns a self-contained, limited set of facts different from those relating to the merits of the dispute.
44. The third factor of the test is met if a preliminary jurisdictional or admissibility objection is capable of disposing of the entire case or at least narrowing the scope of issues to be briefed at the merits stage. Bifurcating the proceedings may thus result in a reduction in the time and costs of any future phase of the proceedings.
45. The Parties disagree on whether the Respondent’s objections meet these factors. The Tribunal considers them below.

²⁶ *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020 (CL-153) para. 27.

²⁷ See *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018 (CL-156) paras. 42, 50, 51.

²⁸ Online Oxford Dictionary.

²⁹ Online Oxford Dictionary.

³⁰ See Chapter II of the Bifurcation Request and Claimant’s Observations on Bifurcation, para. 14.

C. The Respondent's Objections

a) Red Eagle's alleged failure to comply with FTA's conditions precedent

46. As pleaded, this objection has two components: failure by the Claimant to state in its written notice of intent the legal and factual basis for its claims and failure by the Claimant to comply with mandatory time limits. The Tribunal considers them separately.

(i) Failure to state legal and factual basis for its claims

47. Resolution 2090/2014, that was cited by Claimant in its Notice of Intent, triggered (or contributed to trigger) the dispute as it allegedly (i) delimited the SP in a manner that overlapped with 10 out of 11 of Claimant's mining titles; (ii) created doubts on the coverage of the existing grandfathering provisions for continuing activities therein; and (iii) prohibited renewal of permits.³¹

48. The fact that Resolution 2090/2014 was allegedly flawed and subsequently declared unconstitutional in May 2017, created further uncertainty when the Constitutional Court ordered the Ministry of the Environment to conduct a new delimitation of the SP.³²

49. Judgment C-035/16 of the Colombian Constitutional Court ("**Judgment C-035**"), also cited in Claimant's Notice of Intent, declared unconstitutional Law 1753, that had been enacted in 2016, for failing to provide sufficient environmental protection to *paramo* ecosystems by authorizing mining activities with pre-acquired environmental licenses. In this way, and subject to further analysis and Respondent's rebuttal on these issues, Judgment C-035 might be deemed to have eliminated in practice the grandfathering provision for mining titles issued prior to February 9, 2010. Allegedly, the Ministry of the Environment stated that Article 5 of Resolution 2090/2014, that had recognized grandfathering provisions had forfeited legal force.³³ Claimant's claim appears *prima facie* to be based to a large extent on an alleged disregard by Colombia of the grandfathering provision and on the mining stability rights that Claimant purportedly enjoyed. In other words, Colombia's alleged disregard of this stabilization clause seems to be the opening for a number of actions by Colombia that

³¹ Memorial, paras.72-73; art. 5 of Resolution 2090/2014, and Martínez Villegas Legal Report, paras. 126-127 and 135-138.

³² Memorial, para. 77.

³³ Memorial, para. 81, and Martínez Villegas Legal Report, para. 130.

subsequently banned and/or restricted the Claimant's activities in several areas and ordered the Claimant to return the Real Minera area to the State.³⁴

50. These considerations lead the Tribunal to conclude, first, that the Respondent's objection does not appear to be "serious and substantial" because it omits to consider that the Notice of Intent did identify a legal and factual basis of Claimant's claim.
51. Second, as explained above in relation to the implications of Resolution 2090/2014 and Judgment C-035, resolving the Respondent's objections will require an analysis of the facts of the case and the relationship between the different events and the measures taken by Colombia, including the impact of Resolution 2090/2014 and Judgment C-035 (both cited in the Notice of Intent) on the Claimant's alleged rights, the subsequent measures and actions taken by Colombia.
52. Third, the Respondent's objection, even if successful, will not dispose of the entire case. Indeed, there would still be a "consent" to arbitrate in relation to the measures that are specified in the Notice of Intent and the proceeding would continue as to these measures.

(ii) Failure to comply with mandatory time limits

53. If the Claimant had an environmental license on February 9, 2010 or was otherwise entitled to protection or stability under the grandfathering provisional/transitional regime or other provisions of Colombian law enacted prior to the Cut-Off Date, there may be potentially measures subsequent to said date that violated such protection that are relevant to its claim and within the temporal limit of the FTA.³⁵
54. As currently alleged by Claimant, if the Claimant were to be entitled to protection under the transition regime or other provisions, the following measures might not be precluded by the FTA time limit: (i) Resolution 2090/2014;³⁶ (ii) Law 1753 enacted in 2015 that banned activities within the SP except those protected by the transition regime;³⁷ (iii) Judgment C-035 issued in February 2016 that allegedly eliminated in practice the grandfathering provision by declaring Law 1753 unconstitutional;³⁸ (iv) the Ministry of the Environment

³⁴ Memorial, paras.81-86, and Martínez Villegas Legal Report, paras. 131-134 and 137-138.

³⁵ See, for example, allegations in the Memorial at paras. 56- 69 and paras. 70-77.

³⁶ Memorial, paras. 72 *et seq.*

³⁷ Memorial, paras. 80-81.

³⁸ Memorial, para. 81; *see also* Martínez Villegas Legal Report, para. 130 and 135-136.

subsequently declared that Article 5 of Resolution 2090/2014 that had recognized the grandfathering provision had no legal force;³⁹ (v) subsequent measures allegedly banned and/or restricted Claimant's activities in several areas and ordered Claimant to return the Real Minera area to the State;⁴⁰ (vi) CC Judgment T-361 allegedly ordered another delimitation of SP and indicated that further restrictions could be expected;⁴¹ (vii) allegedly, no compensation was paid to Claimant as had been indicated by the Constitutional Court.⁴²

55. To conclude, first, this objection seems to be predicated on the assumption that for deciding this matter the Tribunal could merely examine the measures listed by the Claimant in its Notice of Intent. As explained above, the case at hand seems to be more complex. Thus, it is questionable whether Respondent's objection qualifies as *prima facie* "serious and substantial". Second, the above analysis suggests that *prima facie*, the Respondent's objection is predicated on conclusions reached as to merits issues, and cannot be resolved without an analysis of the relation between the different events and measures alleged as the basis of the Claimant's claims. Third, the Respondent's objection even if successful would not dispose of those claims arising from non-time barred measures.

b) The claims are outside the jurisdiction ratione temporis of the Tribunal

56. The Respondent's argument seems to be premised on the assumption that since the first measures banning mining activities in the *páramos* took place prior to August 2011, all subsequent measures are irrelevant. However, in this early phase in the arbitration, it is unclear to what extent the measures enacted before August 2011 applied to Claimant's investments or whether the Claimant was otherwise entitled to transitional protection. This, because, as Claimant argues, the measures that allegedly disregarded the grandfathering provision established by Law 1382 in February 2010 were issued after August 2011, starting with Resolution 2090 of December 2014 onwards. These issues warrant further debate and analysis during the merits phase.

³⁹ Martínez Villegas Legal Report, para. 130.

⁴⁰ Memorial, paras. 81-84; *see also* Martínez Villegas Legal Report, paras. 137-138.

⁴¹ Martínez Villegas Legal Report, paras. 131-133.

⁴² Martínez Villegas Legal Report, paras. 133-134.

57. The Claimant argues that Colombia's measures constitute not only expropriation, but also a breach of the FET standard through a number of measures that were enacted after the entry into force of the Treaty, including Resolution 2090/2014; communications from the *Autoridad Nacional de Minería* ("ANM") between January and June 2015; Law 1753 of June 9, 2015; Judgment C-035/16; other communications from the ANM banning activities in portions of Claimant's mining titles; Judgment of the Constitutional Court T-361 of May 2017; communication of ANM of August 2017 and letter from *Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga* of December 2019 banning activities in a large portion of one of the mining properties of the Claimant and informing that no further authorizations would be issued until further delimitation of the SP.⁴³
58. The Claimant further claims that a number of measures and actions and omissions of Colombia subsequent to August 2011 lacked transparency,⁴⁴ and were arbitrary and unreasonable,⁴⁵ disproportionate,⁴⁶ and discriminatory.⁴⁷
59. The analysis of the aforementioned claims, their relationship with the Claimant's investments and the measures, actions and omissions of Colombia for purposes of determining whether they fall within the time limits of the Treaty, can only be made in relation to the discussion of the merits.
60. The Tribunal concludes that the above analysis raises doubts as to whether Respondent's objection meets the first test of being *prima facie* "serious and substantial", the objection is merits related, and, even if successful, it would not dispose of the claims arising out of Colombia's measures, actions or omissions subsequent to August 2011.

c) Colombia denied benefits of the FTA to the Claimant

61. In its Memorial and attachments, the Claimant provided *prima facie* evidence that it is a company incorporated in, and in accordance with the laws of Canada, and that as of the date

⁴³ Memorial, para. 142.

⁴⁴ Memorial, paras. 144 *et seq.*

⁴⁵ Memorial, paras. 155 *et seq.*

⁴⁶ Memorial, paras. 160-161

⁴⁷ Memorial, para. 163.

- of filing of the RfA on March 21, 2018, it was owned and controlled by Canadian nationals.⁴⁸
62. Respondent has not provided any evidence to support its objection, other than a general statement that it will do so in the bifurcated proceeding.⁴⁹ Thus the Tribunal has only the evidence submitted by the Claimant to make a *prima facie* assessment of the objection.
63. Respondent admits to having presented its denial of benefits after the date on which Claimant filed its RfA and the Claimant has contended that under Article 25 of the ICSID Convention consent may not be withdrawn.
64. The Tribunal reaches the following conclusions: first, the Respondent has not met the burden of proof even on a *prima facie* basis, particularly in light of the fact that in its Memorial, the Claimant submitted evidence purporting to demonstrate that it is a Canadian company owned and controlled by Canadian nationals. The denial of benefits objection would fail if either: (i) Claimant is owned and controlled by Canadian nationals, **or** (ii) it has substantial business activities in Canada (Article 814 (2) of the FTA). While it is correct that consent may not be withdrawn, the Claimant has to meet the conditions set forth in the Treaty for the consent of the Respondent.
65. Second, the objection is not merits related and, if successful, would actually dispose of the entire case, but in view of the lack of evidence in support of the contentions of the Respondent, the Tribunal considers that bifurcation would not be justified.
66. In sum, on the basis of the materials available to it the Tribunal does not find merit in the objections raised by the Respondent.
67. It remains a final point to be considered by the Tribunal. The parties disagreed on whether bifurcation of one objection weighs in favor of bifurcating other objections that would not otherwise warrant bifurcation. Since the Tribunal has not upheld any of the three objections, the Tribunal does not need to address the parties' arguments on this matter.⁵⁰

⁴⁸ Memorial, para. 89, and documents identified in footnotes 230 to 232.

⁴⁹ Bifurcation Request, para. 64.

⁵⁰ See Bifurcation Request, para. 17 and Claimant's Observations, para. 17.

D. Bifurcation of the merits into liability and quantum

68. The damages calculation put forward by Claimant does not appear *prima facie* to be complex since it claims full reparation of sunk costs based on its audited financial statements. The bifurcation requested by Colombia would only be justified if it can be assumed or *prima facie* determined from the outset that the damages determination will be a complex matter. Claimant's claim based on sunk costs backed by audited financial statements suggests otherwise. Therefore, at this stage the Respondent's request for bifurcating the merits phase into liability and quantum is not justified and is premature. This conclusion does not prevent the Respondent from demonstrating at a later stage the complexity of the calculation of damages to sustain a bifurcation request of the merits.

IV. COSTS

69. Each party has requested the Tribunal to order the other party to pay for the costs incurred associated with the Bifurcation Request. The Tribunal considers that a decision on costs at this early stage of the proceeding would be premature, and that it is a decision more appropriately made at a later stage when the Tribunal has an overall view of the proceeding.

V. DECISION

70. For the preceding reasons the Tribunal decides:
1. To reject the Request for Bifurcation.
 2. To declare that the procedural calendar set forth in Scenario 3 of Annex B, as amended, of Procedural Order No. 1 is now in effect, and the Counter-Memorial on the Merits and Memorial on Jurisdictional Objections are due 90 days from the date of this Decision.
 3. To reserve its position on costs until a later stage of the proceedings.

[Signed]

Mr. José Martínez de Hoz
Arbitrator

Date: 3 August 2020

[Signed]

Professor Philippe Sands
Arbitrator

Date: 3 August 2020

[Signed]

Dr. Andrés Rigo Sureda
President of the Tribunal

Date: 3 August 2020